FLORIDA PUBLIC SERVICE COMMISSION
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MEMORANDUM

October 9, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (CULPEPPER, PELLIGRINI)
DIVISION OF COMMUNICATIONS (NORTON)

RE: DOCKET NO. 970841-TP - COMPLAINT BY MCI TELECOMMUNICATIONS CORPORATION AGAINST GTE FLORIDA INCORPORATED REGARDING ANTICOMPETITIVE PRACTICES RELATED TO EXCESSIVE INTRASTATE SWITCHED ACCESS PRICING

AGENDA: REGULAR AGENDA - OCTOBER 21, 1997 - DECISION PRIOR TO HEARING - MOTION TO DISMISS - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\970841.RCM - DEFERRED FROM OCTOBER 7, 1997, AGENDA - MODIFICATIONS TO ANALYSIS

CASE BACKGROUND

On July 9, 1997, MCI TeleCommunications Corporation (MCI) filed a Complaint Against GTE Florida Incorporated (GTEFL) for Anti-Competitive Practices Related to Excessive Intrastate Switched Access Pricing (Complaint). In its Complaint, MCI asserts that GTEFL is deliberately charging excessive intrastate switched access rates which constitutes an anticompetitive practice. Thus, MCI requests that the Commission exercise its jurisdiction under Sections 364.3381(3) and 364.01(4)(g), Florida Statutes, to investigate GTEFL's intrastate switched access charges; hold a hearing on the matter; determine, after hearing, that GTEFL's

practice violates Sections 364.3381(3) and 364.01(4)(g), Florida Statutes; order GTEFL to make reductions to its intrastate access charge rates as are necessary to eliminate such anti-competitive effects; and grant such other relief as the Commission may deem appropriate.

On July 29, 1997, GTEFL filed a Motion to Dismiss and Supporting Memorandum of Law. On August 11, 1997, MCI filed its Response to [GTEFL's] Motion to Dismiss and Supporting Memorandum of Law. This recommendation addresses GTEFL's motion. This item was deferred from the October 7, 1997, agenda. Minor modifications have been made to the analysis on pages 10 - 13.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant GTE Florida Incorporated's Motion to Dismiss the complaint of MCI Telecommunications Corporation?

RECOMMENDATION: Yes. MCI's complaint seeks relief that is beyond the Commission's jurisdiction to provide in this case, as set forth in Section 364.163, Florida Statutes. Thus, MCI has failed to state a cause of action upon which relief can be granted.

STAFF ANALYSIS:

Standard of Review

The standard of review for a motion to dismiss is that it must show that the petition fails to state a cause of action upon which the Commission may grant the requested relief. All allegations in the petition must be taken as though true, and be considered in the light most favorable to the petitioner. See, e.g, Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So.2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So.2d 233, 235 (Fla. 4th DCA, 1968); Ocala Loan Co. v. Smith, 155 So.2d 711, 715 (Fla. 1st DCA, 1963).

The Complaint

In its Complaint, MCI alleges that GTEFL charges excessive intrastate switched access rates and uses the profits derived from access charges to subsidize GTE-LD's entry into the competitive

interLATA interexchange toll market.[1] (Complaint at p. 9, ¶ 25). MCI asserts that this practice is intentional and, as such, constitutes anticompetitive behavior that is proscribed by Sections 364.3381(3) and 364.01(4)(g), Florida Statutes. MCI also asserts that Section 364.163, Florida Statutes, regarding network access services, does not preclude the Commission from exercising its jurisdiction to investigate and take any necessary action to prevent detected anticompetitive actions and practices.

GTEFL's Motion to Dismiss

GTEFL argues that the Commission does not have jurisdiction to grant the relief MCI requests. Further, GTEFL argues that MCI has not properly alleged any violation of a Commission rule or of Florida Statutes.

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[1]MCI states that GTEFL charges IXCs $.0539 per minute to originate, and $.0670 to terminate a Feature Group D intrastate toll call. MCI further notes that in Order No. PSC-97-0064-FOF-TP, this Commission found that the incremental cost to terminate a call on GTEFL's local network was $.00375 per minute. In addition, MCI states that, in Order No. PSC-97-0128-FOF-TL, the Commission noted that the network over which local and toll calls are terminated is the same. MCI argues that GTEFL's switched access prices are excessive and that the 1500% mark-up yields supracompetitive benefits relative to the cost-based price for local termination. MCI alleges that GTEFL therefore receives approximately $130 million in excess profits, based on 1996 demand data. MCI also argues that GTEFL has nearly 100% of the market share for access services in its territory and thus enjoys a *de facto* monopoly in the provision of access services. Finally, MCI alleges that GTEFL uses the additional $130 million in annual profits to subsidize steep discounts for its intraLATA toll and vertical services; to waive nonrecurring charges on vertical services and second residential access lines; to initiate substantial toll reductions by converting competitive 1+ toll routes to "local calling plans" for its residential customers, and to subsidize the GTE-LD's entry into the competitive interLATA interexchange toll market. MCI states that because GTEFL funds these price breaks with excess profits derived from the access market, the practice constitutes anticompetitive behavior proscribed by Section 364.01(4)(g) and Section 364.3381(3), Florida Statutes.

First, GTEFL asserts that MCI's interpretation of the Commission's authority, as set forth in Section 364.163, Florida Statutes, is incorrect. GTEFL contends that Section 364.163, Florida Statutes, is a complete prescription of intrastate switched access rates. As such, GTEFL asserts that the Commission's authority is limited, as stated in Section 364.163(5), Florida Statutes, to "determining the correctness of any price increases resulting from application of the inflation index [following parity] and making any necessary adjustments." GTEFL also asserts that the Commission is specifically charged with "determining the correctness of any rate decrease ... resulting from the application of this section and making any necessary adjustments to those rates" as set forth in Section 364.163(9), Florida Statutes.

GTEFL argues that the Legislature's consideration of access charge issues in the 1995 session, which resulted in the enactment of Section 364.163, Florida Statutes, was both comprehensive and careful. It was based, GTEFL maintains, on a proper understanding of the link between access charges and the provision of universal service. GTEFL points out that in capping intrastate access rates at July 1, 1995, levels and mandating that local exchange carriers make 5% annual reductions in those rates until parity with December 31, 1994, interstate switched access rates is achieved, the Legislature expressly rejected numerous other proposals, including proposals that would have authorized the Commission to order access rate decreases and to establish cost-based access charges. GTEFL concludes that the Commission is without authority to override the Legislature's policy decisions regarding access charges. Thus, GTEFL argues that any Commission decision finding that statutorily compliant access rates must be reduced because they are anticompetitive would be "ultra vires" and without legal effect. Citation to Burris, Administrative Law, 1987 Survey of Florida Law, 12 Nova L. Rev. 299, 316 (1988) and State Dept. Of Insurance v. Ins. Svcs. Office, 434 So. 2d 908 (Fla. 1st DCA 1983).

In addition, GTEFL observes that Sections 364.01(4)(g) and 364.3381(3), Florida Statutes, vest the Commission with a general authority to curtail anticompetitive behavior. In contrast, it states that Section 364.163, Florida Statutes, prescribes completely the Commission's authority to affect access rates. As such, GTEFL argues that the Commission would have to ignore the statutory constraints on its jurisdiction over access charges and rely instead on a general grant of authority in order to sustain MCI's complaint. GTEFL asserts that such a reading of the statutes

would be absurd. GTEFL further states that if the Commission had complete jurisdiction over access charges, there would be no need for the specific grants of ministerial discretion set forth in Section 364.163, Florida Statutes. Applying a rule of statutory construction, GTEFL concludes that Section 364.163, Florida Statutes, a specific provision, must prevail over Sections 364.01(4)(g) and 364.3381(3), Florida Statutes, both of which confer general authority.

GTEFL further observes that MCI does not ground its complaint in subparts (1) and (2) of Section 364.3381, Florida Statutes, which prohibit anticompetitive cross-subsidization. Instead, GTEFL states that MCI has chosen to base its complaint on subpart (3), which confers the Commission with only general regulatory oversight "over cross-subsidization, predatory pricing, or other similar anticompetitive behavior." GTEFL contends that the "anticompetitive evil" associated with cross-subsidization is below-cost pricing, and it asserts that MCI does not, and cannot, claim that it prices any of its services below cost. GTEFL also states that it has fully complied with Section 364.163, Florida Statutes, as demonstrated by tariff filing T-96-740.

Finally, GTEFL observes that it is widely recognized that access charges are high relative to costs because of longstanding social policies of subsidizing basic local service rates. Thus, GTEFL maintains that MCI cannot sustain its allegations of anticompetitive subsidization. In addition, GTEFL argues that whether the rates are anticompetitive or excessive is a purely legal issue. Thus, GTEFL asserts that there is nothing to investigate; this is a purely jurisdictional matter. GTEFL therefore asserts that the Commission need not conduct a hearing on this matter.

MCI's Response to the Motion to Dismiss

In its response, MCI argues that Section 364.163, Florida Statutes, must be read in conjunction with Sections 364.01(4)(g) and 364.3381(3), Florida Statutes. MCI contends that the Legislature, in restructuring the regulation of the telecommunications industry in Florida to foster the development of competition, intended that the Commission prevent anticompetitive behavior. MCI maintains that Section 364.163, Florida Statutes, must be read within the context of the Legislature's ultimate charge to the Commission to encourage competition. It argues that

GTEFL's access rates represent a pricing practice that threatens that underlying goal; thus, the Commission must prevent GTEFL's anticompetitive conduct.

MCI also argues that GTEFL incorrectly applies the rules of statutory construction. MCI asserts that there is no need to determine whether Section 364.163, Florida Statutes, or Section 364.3381(3), Florida Statutes, controls because the Commission's authority over anticompetitive behavior may be construed consistent with Section 364.163, Florida Statutes. MCI argues that because nothing in Section 364.163, Florida Statutes, states that the Commission may not reduce access charges, it could do so under the authority granted to the Commission by Section 364.3381(3), Florida Statutes. MCI acknowledges that the Commission does not have broad authority over access rate levels, but it asserts that the Commission's jurisdiction over anticompetitive conduct does provide the Commission with an avenue to address this issue.

Staff's Recommendation

Having reviewed the statutory provisions in question, staff does not believe that the Commission can grant the ultimate relief requested by MCI in this particular situation.[2] The specific provisions of Section 364.163, Florida Statutes, clearly limit the Commission's authority to act with regard to switched access rates.

Section 364.163, Florida Statutes, provides, in part:

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[2] Technical staff notes that regulatory bodies are very aware of the competitive problems that exist with the dichotomy between local interconnection and switched access prices, particularly in light of the local competition requirements of the Telecommunications Act of 1996. Where this Commission has had authority to do so, it has acted to reduce switched access rates. (See DN 920260-TL) In addition, the applicability of Sections 251 and 252 costing and pricing requirements of the Telecommunications Act of 1996 to switched access was raised in several interconnection proceedings in Florida. In addition, the FCC, in CC Docket No. 96-262, is aggressively pursuing access charge reform for interstate switched access. Our conclusions in this recommendation should in no way be construed as a lack of awareness of the seriousness of the issues raised.

(1) Effective January 1, 1996, the rates for network access services of each company subject to this section shall be capped at the rates in effect on July 1, 1995, and shall remain capped until January 1, 1999. Upon the date of filing its election with the commission, the network access service rates of a company that elects to become subject to this section shall be capped at the rates in effect on that date and shall remain capped for 3 years.

(2) After the termination of the caps imposed on rates by subsection (1) and after a local exchange telecommunications company's intrastate switched access rates reach parity with its interstate switched access rates, a company subject to this section may, on 30 days' notice, annually adjust any specific network access service rate in an amount not to exceed the cumulative change in inflation experienced after the date of the last adjustment, provided, however, that no such adjustment shall ever exceed 3 percent annually of the then-current prices. Inflation shall be measured by the changes in Gross Domestic Product Fixed 1987 Weights Price Index, or successor fixed weight price index, published in the Survey of Current Business, or successor publication, by the United States Department of Commerce.

(3) After the termination of the caps imposed on rates by subsection (1), a company subject to this section may, at any time, petition the

commission for a network access service rate change to recover the cost of governmentally mandated projects or programs or an increase in federal or state income tax incurred after that date. . . .

(4) . . . Notwithstanding subsections (1), (2), and (3), a company subject to this section may choose to decrease network service rates at any time, and decreased rates shall become effective upon 7 days' notice.

(5) Company proposed changes to the terms and conditions for ex sting network access services in accordance with subsection (1), (2), (3), and (4) shall be presumed valid and become effective upon 15 days' notice. Company-proposed rate reductions shall become effective upon 7 days' notice. Rate increases made by the local exchange telecommunications company shall be presumed valid and become effective on the date specified in the tariff, but in no event earlier than 30 days after the filing of such tariff. The commission shall have continuing regulatory oversight of local exchange telecommunications company-provided network access services for purposes of determining the correctness of any price increase resulting from the application of the inflation index and making any necessary adjustments, establishing reasonable service quality criteria, and assuring resolution of service complaints. . . .

(6) Any local exchange

> telecommunications company whose current intrastate switched access rates are higher than its interstate switched access rates in effect on December 31, 1994, shall reduce its intrastate switched access rates by 5 percent annually beginning October 1, 1996. Any such company shall be relieved of this requirement if it reduces such rates by a greater percentage by the relevant date or earlier, taking into account any reduction made pursuant to Florida Pubic Service Commission Order No. PSC-94-0172-FOF-TL. Upon reaching parity between intrastate and 1994 interstate switched access rates, no further reductions shall be required. Any telecommunications company whose intrastate switched access rate is reduced by this subsection shall decrease its customer long distance rates by the amount necessary to return the benefits of such reduction to its customers.
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> (9) The commission shall have continuing regulatory oversight of intrastate switched access and customer long distance rates for purpose of determining the correctness of any rate decrease by a telecommunications company resulting from the application of this section and making any necessary adjustments to those rates, establishing reasonable service quality criteria, and assuring resolution of service complaints.

Section 364.01(4)(g), Florida Statutes, provides that:

> (4) The Commission shall exercise its exclusive jurisdiction in order to:
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> (g) Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior . . . .

Section 364.3381(3), Florida Statutes, provides that:

> The Commission shall have continuing oversight jurisdiction over cross-subsidization, predatory pricing or similar anticompetitive behavior and may investigate, upon complaint or on its own motion, allegations of such practices.

First, Section 364.163, Florida Statutes, presents a specific and detailed process for the capping and reduction of access charges. The Commission is given regulatory oversight over this process. The maxim *expressio unius est exclusio alterius* is applicable in this case. Under this principle, the mention of one thing implies the exclusion of another. Id. It also follows from this principle that when a statute specifies a certain process by which something must be done, it implies that it shall not be done in any other manner. See Botany Worsted Mills v. US, 278 US 282; 73 L. ED. 379, 385 (1929)("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.") See also In re Investigation of a Circuit Judge of the Eleventh Judicial Circuit of Florida, 93 So. 2d 601, 606 (Fla. 1957)(". . . where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner.") Applying this principle, staff believes that the express enumeration of the process for reducing access rates set forth in Section 364.163, Florida Statutes, precludes reduction of access rates in any other manner.

Rules of statutory construction also require that specific statutory provisions be given greater weight than general provisions when the provisions in question cannot be harmonized. See Sutherland, Statutory Construction, 5th Ed., Volume 2A, §46.05; 49 Fla. Jur. 2d § 182; Bogue v. Fennelly, 1997 WL 276289 (Fla. 4th

DCA 1997); and Suntrust Banks of Fla. v. Wood, 693 So. 2d 99 (Fla. 5th DCA 1997). In Adams v. Culver, the Court stated that

> It is a well settled rule of statutory construction, however, that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. In this situation 'the statute relating to the particular part of the general subject will operate as an exception to or qualification of the general terms of the more comprehensive statute to the extent only of the repugnancy, if any.'

111 So. 2d 665 at 667 (Fla. 1959), citing Stewart v. DeLand -Lake Helen etc., 71 So. 42, 47 (1916), quoting State ex rel. Loftin v. McMillan, 45 So. 882. Therefore, the specific limiting provisions of Section 364.163, Florida Statutes, should prevail over the general grants of authority in Sections 364.01(4)(g) and 364.3381(3), Florida Statutes, or act as an exception to the Commission's ability to investigate anticompetitive acts and complaints of cross-subsidization.

Finally, it is well established that administrative agencies only have the power conferred upon them by statute and must exercise their authority in accordance with the controlling law. 1 Fla. Jur. § 71, p. 289. As such, grants of authority to an administrative body are generally limited to those powers either expressly enumerated or clearly implied by necessity. See Sutherland, Statutory Construction, 5th Ed., Volume 3, §65.02; and Keating v. State ex rel. Ausebel, 167 So. 2d 46 (Fla. 1st DCA 1964). If there is reasonable doubt as to the scope of a power, it should be resolved against the exercise of that power. State ex rel. Burr et al.,State Railroad Commissioners v. Jacksonville Terminal Co., 71 So.474 (1916). As stated in Edgerton v. International Company, 89 So. 2d 488, 490 (1956),

> A commission may not assert the general power given it and at the same time disregard the essential conditions imposed upon its exercise. Officers must obey a law found upon the statute books until in a proper proceeding its constitutionality is judicially passed

upon.

Section 364.163(9), Florida Statutes, states that the Commission has "continuing regulatory oversight of intrastate switched access . . . for the purposes of determining the correctness of any rate decrease . . . resulting from application of this section [364.163, Florida Statutes,]" and the ability to make any adjustments necessary to ensure compliance with this section. There is, however, no clear expression in either Section 364.01(4)(g) or 364.3381(3), Florida Statutes, that the Commission's authority to investigate anticompetitive practices and claims of cross-subsidization does apply or must be applied in the area of access charges, nor must such a grant of authority be implied in order for either set of provisions to operate effectively. Staff believes that Section 364.163, Florida Statutes, is a clear delineation of the process for reducing access charges and of the Commission's authority in that area. Staff does not believe that Sections 364.01(4)(g) and 364.3381(3), Florida Statutes, authorize the Commission to reduce access charges in any other manner for any other reason.

Furthermore, staff believes that there is reason to conclude that the Legislature in 1995 was fully apprised of the level of access rates in relation to costs and the significance of access rates for the development of competitive markets at the time. Thus, it appears fair to conclude that had the Legislature seen the level of intrastate switched access rates as a potentially material impediment to the development of competitive telecommunications markets, it would have expressly authorized the Commission to reduce access rates, beyond the statutorily-mandated reductions, upon a finding of anticompetitive behavior. It did not.

MCI argues that the 1995 Legislature could not have foreseen the fact that the Telecommunications Act of 1996 would free GTEFL from the consent decree prohibiting GTEFL from offering integrated local and long distance service and that, thereafter, GTEFL would use its access charges to subsidize its entry into the competitive interLATA interexchange toll market. Staff agrees that the 1995 Legislature could not have foreseen the effects of the 1996 Act. Nevertheless, while staff notes that the access charge issue was a topic of some interest during both the 1996 and 1997 Legislative sessions, the Legislature did not make any statutory changes in this area.

In view of the restraints placed on the Commission's authority with regard to access charges, staff believes that a hearing should not be held on this matter. Not only would the Commission not be able to grant the ultimate relief sought, but staff is concerned that a hearing on MCI's complaint could be perceived as improperly circumventing the restraints on Commission authority.

For all of the foregoing reasons, staff recommends that the Commission grant GTEFL's motion to dismiss MCI's complaint.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. If the Commission accepts staff's recommendation in Issue 1 to grant GTEFL's motion to dismiss MCI's complaint, this docket should be closed.

STAFF ANALYSIS: Yes. If the Commission accepts staff's recommendation in Issue 1 to grant GTEFL's motion to dismiss MCI's complaint, this docket should be closed.